CASE NO. 88-2288

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

LINDA L. ROBERTS, Petitioner,

v.

THE TOWN OF HUDSON, Respondent.

QUESTIONS PRESENTED

1. Was the Petitioner denied either due process of law or a fair trial within the meaning of the due process clause of the 14th Amendment of the Constitution of the United States when the assistant state attorney merely argued to the jury facts testified to by witnesses at trial?

2. Was the Petitioner denied either due process of law or equal protection of the law simply because her case falls within a recognized exception to the decision of the Supreme Court of Florida in Tascano v. State, 393 So.2d 540 (1980) which states that jury instructions on penalties for lesser included offenses need not be given?

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CASE NO. 81-2230

IN THE

SUPREME COURT OF THE UNITED STATES

1981 TERM

LINDA L. McGOUGH, Petitioner,

v.

STATE OF FLORIDA, Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

CITATION TO OPINIONS BELOW

The State accepts Petitioner's statement pursuant to Rule 34, F.R.A.P.

JURISDICTION

The State accepts Petitioner's statement while maintaining that Petitioner is not entitled to certiorari, for failure to comply with the requirement of Rule 17, F.R.A.P.

STATEMENT OF THE CASE

In her original appellate brief, filed in the Fifth District Court of Appeal of Florida, and again in the Supreme Court of Florida, McGough omitted certain relevant facts which were dispositive of her case when revealed.

McGough, once again, has omitted these relevant facts.

McGough's "Statement of the Case" (p.2) implies that the Assistant Attorney, at trial, made a bald statement of his personal belief in the credibility of certain State witnesses, based upon his independent conversations with these witnesses.

The real facts are as follows:

Linda McGough was tried on a charge of Murder in the First Degree.

During the trial, the prosecutor called Judy Willits to the stand, who testified:

> And when I went down to your office, I lied. And then you threatened me with perjury charges and told me I could get up to five years in prison. And I decided I wasn't going to go to jail for anyone. (Tr. 222, Resp. App. 1)

Three other times, during the trial, Willits came back to this conversation while being questioned.

In closing argument, the prosecutor told the jury:

> She came into my office and, for about an hour, told me that, I advised her of perjury. (TR 11, Resp. App. 2).

A second State witness, Mr. William McCraney, also testified that he had been threatened with perjury (TR 128-129, Resp.

App. 3-4) and, again, this fact was mentioned during closing argument. (TR 12).

While the Petitioner's objection during closing was sustained, the court sustained on the basis of form, not substance, due to the prosecutor's unfortunate use of the "first person" (i.e. "I told them").

The colloquoy was as follows: (TR 12)

> MR. BAND: Well, I took his, I took the statements and the jury is aware I took the statements.
>
> THE COURT: I understand, but you are testifying about what you did. You are testifying about what your practice is about prosecuting for perjury.

Mistrial was denied by the court, which exercised its legitimate option to instruct the jury that arguments of counsel

are not evidence. (TR 37)

Defense counsel requested separate jury instructions on the possible sentences which could be imposed for every possible lesser included offense. (TR 3) The request was denied.

As noted in Petitioner's brief, her case was subject to review pursuant to Tascano v. State of Florida, 393 So.2d 540 (Fla. 1980). Tascano's holding is, again, misstated by Petitioner (as called to the Petitioner's attention twice before) and actualy provides that defendants are entitled to jury instructions on the maximum and minimum sentences only for the crime for which they are actually on trial.

McGough's continuing misstatements of fact, now repeated for the third time, are, hopefully, inadvertent.

No issues of federal or constitutional law were briefed by McGough in State court, and no basis for Rule 17 review exists.

STATUTES AND RULES INVOLVED

Florida Rule of Criminal Procedure 3.390(a)

> The presiding judge shall charge the jury only upon the law of the case at conclusion of argument of counsel and at the request of either the State or the defendant the judge shall include in said charge the maximum and minimum sentences which may be imposed (including probation) for the offense for which the accused is then on trial.

FEDERAL RULE OF APPELLATE PROCEDURE RULE 17 (b) and (c)

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the

Court's discretion, indicate the character or reasons that will be considered.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or a federal court of appeals.

(c) When a state court or federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

REASONS FOR DENYING THE WRIT

As quoted above, F.R.A.P. 17 provides for certiorari review of certain classes of cases, all of which involve state court (or lower federal court) interpretations of federal law and federal, constitutional claims.

The Petitioner, Linda McGough, has never submitted a brief to any Florida court raising either a 5th or 14th Amendment claim. Thus, Florida's courts have no opportunity to address these de novo issues.

The Petitioner has failed to recite any authority for the proposition that, despite the established federal doctrines of exhaustion and comity, she should now be granted certiorari review on the basis of issues not raised in Florida's courts.

Nevertheless, and without conceding standing, the Respondent submits.

I.

Florida's appellate courts do not write a specific opinion explaining every argument they choose to reject. This is

particularly true when an argument, such as McGough's argument concerning the prosecutor's conduct, comes before the appellate court on an incorrect statement of the facts.

McGough, for the third time, has drafted a statement of facts which implies that the prosecutor revealed, during closing arguments, facts that were not in evidence regarding threats of perjury and undisclosed, out-of-court interviews with the witnesses. McGough, for the third time, has failed to include in her statement the fact that the prosecutor's comments were fully supported by the trial testimony of the witnesses.

This Honorable Court's decision in Berger v. United States, 295 U.S. 668, 55 S.Ct. 629 does not involve fair comment, by

a prosecutor, on the actual testimony of the witnesses at trial. Nor does it compel the reversal of valid convictions simply because the prosecutor used improper syntax, tense or grammer while arguing to the jury.

In Thomas v. State of Florida, 325 So.2d 413, 415 (Fla. 1975) the Supreme Court of Florida observed:

> Public prosecutors are allowed to advance to the jury all legitimate arguments within the limits of their forensic talents in order to effectuate their enforcement the criminal laws. Their discussion of the evidence, so long as it remains within the limits of the record, is not to be condemned . . .

The Supreme Court of Florida the, relying upon its decision in Paramore v. State of Florida, 224 So.2d 855 (Fla. 1969) refused to "presume prejudice" as a result

of "impassioned eloquence", and stated that it would not overturn a trial judge's decision absent a clear abuse of discretion by that judge.

Petitioner McGough's case may be said to contrast with United States v. Lamerson, 457 F.2d 371 (5th Cir. 1972), wherein a prosecutor simply argued that, for unexplained reasons, he "knew" the witnesses had told the truth.

This is how McGough, by editing out uncomfortable facts, would have this Honorable Court view the case at bar. At page 6 of her petition, McGough states:

> The ultimate effect of the prosecutor's arguments in this case were to leave no doubt in the minds of the jury that his investigations established that he had knowledge that had not [been] received in evidence that would corroborate the witnesses' story. [I]n fact, the prosecutor advised the jury that he

> had taken personal steps to verify the witnesses' statements, that he had done so, and that therefore there were matters outside the records which assured him that his witnesses had told the truth. (typographical errors bracketed)

The decisions of the Fifth District Court of Appeals and the Supreme Court of Florida are supported by the true facts, and should not be overturned on the basis of incorrect factual representations.

It further goes without saying that the Florida Supreme Court has exclusive jurisdiction to regulate practice and procedure in Florida's courts, and that absent a demonstrable violation of federal constitutional rights, certiorari should be denied.

II.

The Petitioner has claimed that certain imagined "rights" she thinks she holds, under Tascana v. State of Florida, 393 So.2d 540 (Fla. 1980), were deliberately withheld held from her.

Petitioner argues at page (7) that:

> The Supreme Court of Florida ruled that all accused in Florida henceforth were mandatorily entitled to an instruction on the maximum and minimum offenses for which they were charged.

Tascana, supra says nothing of the kind. Rather, it says that defendants are mandatorily entitled to an instruction on the maximum and minimum sentences (not "offenses") for the charge for which they are actually on trial, as provided for in Fla.R.Crim.P. 3.390(a).

The Petitioner also neglected to mention that every Florida district court of appeal which has confronted this question has ruled in a manner identical to McGough's court. See James v. State, 393 So.2d 1138 (Fla. 3d DCA 1981); Settle v. State, 288 So.2d 511 (Fla. 2d DCA 1974); Lewis v. State, 399 So.2d 473 (Fla. 4th DCA 1981) and Renaud v. State, 408 So.2d 1061 (Fla. 4th DCA 1981).

None of these cases were reversed by Florida's Supreme Court, providing us with strong indicia of correctness.

It must be remembered that McGough went into trial charged with murder in the first degree. McGough was convicted of murder in the second degree.

It must also be remembered that, despite being advised of the possible

sentences (including probation) for the crime charged, Florida juries are also specifically instructed to disregard the consequences of their verdicts (this admonition is contained in Florida Standard Jury Instruction 2.15).

Thus, at worst, the jurors failed to obtain information which they were legally bound to disregard anyway.

McGough has failed to demonstrate legal entitlement to the requested instructions, a denial of due process, or prejudice, and is not entitled to certiorari. Finally, absent some showing that McGough has suffered a unique construction of Florida procedural law, unlike that given other defendants, no claim that "equal protection" has been denied is tenable, or subject to review.

CONCLUSION

Due to the fact that this petition is founded upon gross and substantial misstatements of fact and law, and due to the absence of any error by the Florida courts, constitutional or otherwise, certiorari review should be denied.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to the United States Supreme Court and to Albert J. Ahern, Jr., One Skyline Place, Bailey's Crossroads, Virginia 22041; Josiah Lyman, 2025 Eye Street, N.W., Washington, D.C. 20006; and Warren H. Edwards, Suite 101, 65 N. Orange, Avenue, Orlando, Florida 32801, this day of July, 1982.

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